ordinarily owed by a non-occupier to others lawfully on the premises. Lord Atkin said:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Counsel for the appellants laid special emphasis on this principle in support of the contention that the District Judge erred in law in finding that the respondents did not owe the workman any duty to take care He contended that the aforesaid rule applied so as to make the respondents liable in damages for the workman's injuries through their negligence.

Counsel for the respondents replied to the effect that the particular relationship between the workman and the respondents did not create a duty of care. He also contended that the workman knew of the defects in the scaffolding by inspection and therefore voluntarily undertook the risk with full knowledge of the consequences of what he was doing. He further submitted that the workman was a trespasser. He also said that there was no common interest between the injured workman and the respondents.

As I have already stated, there was no evidence that the workman had been warned or that he undertook the risk of standing on the scaffolding with such knowledge as to exonerate the respondents from their duty towards him as contractors engaged in a common Hotel project, together with the appellants, of laying mosaic tiles on the outer walls of the Hilton Hotel building. They were all fellow-invitees at the Hotel during the performance of their tiling contracts. The workman was not a trespasser whilst on the premises and there was no evidence that he was excluded from the use of the respondents scaffolding in any way nor were the appellants' contracts' supervisor or the clerk of works for the whole project so excluded from the scaffolding erected by the other. Nor, significantly, did anyone on behalf of the respondents say so.

Finally, the appellants were under no obligation in a claim such as this to give any notice under Regulation 13 to the respondents (who were outside the scope of section 19(2)) nor was any question requiring determination of the amount payable ever referred to arbitration at the instance of the respondents as was open to them under section 20(b).

In my judgment, the respondents by their failure to repair or remove their dangerous scaffolding after being repeatedly warned by the architect of the Hotel project to do so created a situation which they could reasonably foresee would be likely to injure persons like the workman in question who clearly fell within the proximity rule.

The appeal is accordingly allowed with costs.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

MALAYSIAN REPORTS

LEE TECK HOCK v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) February 23, 1972]
[Sibu — Criminal Appeal No. 6 of 1971]

Criminal Law and Procedure — Order for retrial — Whether accused can be tried on original charge and alternative charge — Criminal Procedure Code (Sarawak Cap. 58), ss. 144 & 267(C).

The appellant had originally been convicted on a charge of driving a motor car without due care and attention. On appeal, the High Court quashed the conviction and ordered a new trial. Subsequently the appellant was charged with two charges, the original charge of driving a motor car without due care and attention and an alternative charge of driving the motor vehicle without reasonable consideration for other persons using the road. At the retrial he was convicted of driving without due care and attention. The alternative charge of driving without reasonable consideration for other persons using the road was struck out at the conclusion of the defence case. The appellant appealed. Section 267(c) of the Sarawak Criminal Procedure reads:-

"In an appeal from a conviction the court may

(a), (b). . . .

(c) direct that further inquiry be made or order a new trial on the same or an amended charge."

Held: as the learned judge had merely ordered a new trial in this case, it was wrong to allow the addition of an alternative charge to the original charge at the commencement of the case when it was reheard. As the proceedings seemed to contravene the order of the High Court and to depart from the ambit of section 267 of the Sarawak Criminal Procedure Code, the conviction and sentence must be set aside.

Cases referred to:-

(1) *R.* v. *Goh Choo Lan* 4 Ky. 407.

(2) *Lim Tuan Hong* v. *Herman Jebson & Co.* 4 Ky. 79.

CRIMINAL APPEAL.

Chong Siew Chiang for the applicants.

Steve Shim Lip Khiong (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: The appellant (the accused in the lower court) was originally charged as follows:—

"That you, on or about the 24th day of May, 1969 at or about 8.35 p.m. around 2nd mile Oya Road, Sibu, did drive a motor vehicle to wit, a private motor car bearing registration plate licence No. S. 2392, without due care and attention, thus resulting in your knocking down a man cyclist, and that you thereby committed an offence punishable under section 30 of the Road Traffic Ordinance, 1960."

He claimed trial and was represented by counsel.

In the event the appellant was convicted and fined $50 or two weeks' imprisonment in default. He appealed to the High Court on the ground that he was charged under the first limb of section 30 of the Road Traffic Ordinance, namely driving without due care and attention, and not charged under the first limb or second limb of section 30 of the Road Traffic Ordinance. In other words he was not charged in the alternative.

The section reads as follows:—

"30. Any person who drives a vehicle on a road without due care and attention, or without reasonable consideration for other persons using the road shall be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars."

The learned judge in delivering judgment ordering a new trial in *Lee Teck Hock* v. *Public Prosecutor* (Criminal Appeal No. 1/70) said at page 2:

"To be precise, the appellant was not charged with driving without due care and attention *OR* without reasonable consideration for other persons using the road. Such a charge would be bad for duplicity as two offences would be included in the same charge. That the provisions of section 30 of the Road Traffic Ordinance are intended to create two separate offences instead of one are clear from the authority. Avory J. in delivering the leading judgment of the Court of Appeal in the case of *The King* v. *Surrey Justices* [1932] 1 K.B. 450 said:—

In my view, the whole question in this case is whether section 12 of the Act of 1930 (which section corresponds with section 30 of the Road Traffic Ordinance) can be read as comprising two separate offences or whether it creates only one.... On consideration of this section, however, I have come to the conclusion that it contemplates two separate offences: (1) driving without due care and attention and (2) driving without reasonable consideration for other persons using the road.'

....

The trial magistrate went on and alleged that —

'So the elements to be proved here are whether:—

(a) accused drove his car without due care and attention or

(b) without reasonable consideration for other persons using the road.'

(b) Secondly, towards the end of his judgment he said:—

'So in my opinion accused driving very fast, on the wrong side of the road, with full light on and knocked Wong Lik Wong down are sufficient grounds to constitute an offence under section 30 of the Road Traffic Ordinance and therefore I find him guilty of an offence under that section of the Road Traffic Ordinance and accordingly I convict accused.'

Counsel for the appellant criticised the judgment on the ground that the conviction was bad for ambiguity. It was contended that the decision could be subjected to various interpretations. It could mean that the trial magistrate found the appellant guilty under the first limb, or the second limb or both limbs of section 30 of the Road Traffic Ordinance. The learned Deputy Public Prosecutor conceded that the conviction was bad."

then lower down in the judgment:

"The conviction is quashed and the sentence set aside. I order a new trial before another magistrate."

Following the said order made by the High Court, Sibu, on 15th August, 1970, the appellant was subsequently charged as follows:—

"(1) That you, on or about 24th day of May, 1969 at or about 8.35 p.m. around 2nd mile Oya Road, Sibu, did drive a motor vehicle to wit, a private motor car bearing registration plate licence No. S. 2392, without due care and attention, thus resulting in your knocking down a man cyclist, and that you thereby committed an offence punishable under section 30 of the Road Traffic Ordinance, 1960.

Alternative:

(2) That you, on or about the 24th day of May, 1969, at or about 8.35 p.m. around 2nd Mile, Oya Road, Sibu, did drive a motor vehicle to wit, a private motor car bearing registration plate licence No. S. 2392, without reasonable consideration for other persons using the road, thus resulting in your knocking down a man cyclist, and that you thereby committed an offence punishable under section 30 of the Road Traffic Ordinance, 1960."

and was convicted in the District Court, Sibu, on the 31st March, 1971, of driving without due care and attention and was fined $60. In addition the driving licence to be endorsed and suspended for six months.

The alternative charge of driving without reasonable consideration for other persons using the road was struck out at the conclusion of the defence case.

Against the conviction he has again appealed on a number of grounds. I need only deal with one viz:

"The learned trial magistrate erred in allowing the Public Prosecutor to add in an alternative charge that is to say an alternative charge of driving a motor car without reasonable consideration of other persons using the road at the commencement of the action."

It is convenient to set out the provisions of section 267(c) of the Sarawak Criminal Procedure Code (Cap. 58) which reads as follows:—

"In an appeal from a conviction the court may —
(a), (b), ...
(c) direct that further inquiry be made or order a *new trial* on the *same or an amended* charge;
(d), (e), ..."

It is to be observed that corresponding provision in the Criminal Procedure Code (F.M.S. Cap. 6) reads as follows:

"316(a) ...or that the accused be re-tried...."

The Criminal Procedure Code of the Colony (see page 464 of *Mallal's* Criminal Procedure — 4th Edn.) is section 299(a) and is in pari-materia with F.M.S. (Cap. 6) section 316(a).

It is to be observed that the Indian Criminal Procedure Code (See *Sohoni's* 16th Edition Vol. III page 2542) provides as follows:—

"S. 423(1)(b) in an appeal from a conviction —
(1) ...or order him to be re-tried by...."

It will therefore be observed that whilst the States, Colony and Indian provisions are similar, that of Sarawak is drafted differently.

It is contended by counsel for appellant that section 267(c) of the Sarawak Laws provides that in an appeal from a conviction, the court may order a new trial on the same or amended charge. It is clear therefore that the learned judge did not direct an alternative charge to be added against the accused. If it were so, the learned judge would undoubtedly have said so in the order. To allow the addition of an alternative charge to the original charge at the commencement of the case heard on 15th August, 1970, seems to contravene the order of the High Court, and to depart from the ambit of the provisions of section 267 of the Sarawak Criminal Procedure Code and thus vitiate the proceedings.

In my judgment, the court is perfectly entitled to amend the charge at the close of the prosecution's case under section 144 Criminal Procedure Code if it is of the opinion that the accused person has committed other offences in order to enable the court to alter or add any other charges against the accused.

I agree with the argument of counsel that it would be wrong for the lower court to add a charge before any evidence is produced before it, since the learned judge merely ordered a new trial.

I am fortified in this opinion by the view of the learned author of *Sohoni's* Criminal Procedure Code Volume III (16th Edition) at page 2582, para 77 where he observed:

"When a conviction is set aside and a re-trial is ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed — *Nazimuddin* v. *Emperor* I.L.R. 40 Cal. 163."

I wish to make it clear that so far as this court is concerned, I am guided in this appeal by the procedure prescribed by the Sarawak Code of Criminal Procedure unfettered by any observations that have been made by the Malayan or English Law which has no counterpart in Sarawak Laws.

I have requested for certain authorities, the Library here being out of reach of some of them, and I am obliged to the learned Deputy Public Prosecutor for sending them to me last month.

They are *R.* v. *Goh Choo Lan*[1] and *Lim Tuan Hong* v. *Herman Jebson & Co.*[2]

In my opinion neither of these cases helps in the determination of this point. They were however decided on the provisions of the Colony Criminal Procedure Code which has no counterpart in our Sarawak Criminal Procedure Code.

The decision of the learned magistrate has also been attacked on other grounds.

It is sufficient for me to say that on the issue of fact the court unhesitatingly accepted the evidence of the witnesses for the prosecution and rejected that of the accused, the learned magistrate having had the benefit of observing their demeanour and of listening to their evidence. He had weighed their evidence with some care against the other evidence in the case and I can discover no reason for quarrelling with him for rejecting it.

Accordingly, I would order a new trial on the same charge i.e. the first limb of section 30 of Road Traffic Ordinance — driving without due care and attention before another magistrate.

I accordingly set aside the conviction, sentence and endorsement on licence.

I express the hope that the prosecution will in view of the circumstances see fit not to proceed with the retrial, since the accused has twice been tried for the offence.

I merely feel that generally on the facts of this particular case the interest of justice would be served by taking the more humane course.

In any event I leave the matter entirely in the hands of the prosecution.

Conviction set aside.

LEE AH MOI v. PUBLIC PROSECUTOR

[R.CrJ. (Ong C.J.) March 27, 1973]
[Kuala Lumpur — Criminal Revision No. 3 of 1973]

Criminal Law and Procedure — Charge of causing death by reckless or dangerous driving — No evidence of selfish disregard for the safety of other road users — Conviction for careless and inconsiderate driving substituted — Road Traffic Ordinance 1958, ss. 34A and 36(1).

Road Traffic — Reckless and dangerous driving — Sentence — Unavoidable accident.

In this case the accused had been convicted of the offence of causing death by reckless or dangerous driving The facts showed that the fatal accident occurred at Jalan Pudu to an old women of 67 who was attempting to cross the road between gaps in vehicular traffic.

Held; the evidence did not support a conviction for the offence of causing death by reckless or dangerious driving and a conviction for careless and inconsiderate driving should be substituted.

Per Ong C.J.: "I entirely agree that reckless or dangerous driving should merit punishment which will serve as a deterrent to selfish motorists. But, as in this case, where the accident was practically unavoidable or could have been avoided only by extraordinary care and instantaneous reflexive action, I must, with all respect, say that the sentence was both harsh and excessive. The use of motor-vehicles is a necessity in this day and age. I do not think any motorist should be exposed to the hazard of going to prison for long stretches unless he drives in a manner which evinces a truly culpable disregard for the safety of other road users."

CRIMINAL REVISION.

Ong C.J.: On March 14, 1973, I received a letter from a legal practitioner calling attention to the sentences imposed on the accused in three cases of causing death by reckless or dangerous driving, under section 34A of the Road Traffic Ordinance 1958, where sentences of 12 months, 12 months and 18 months imprisonment were passed respectively and disqualification in each case imposed on holding a driving licence for all classes of vehicles for 10 years. I called for the files and decided that the sentence in any events was in need of revision.

In the instant case the fatal accident occurred shortly after noon on May 26, 1966 at Jalan Pudu, a busy thoroughfare, to an old woman of 67 who was undoubtedly attempting to cross the road between gaps in vehicular traffic. This in itself, I must say with all due regard and sympathy for the relatives of the deceased, was a dangerous thing for any pedestrian to do — especially one whose agility had been greatly diminished by age.

There was evidence of an eye-witness whom the learned president believed to be telling the truth. I have no doubt he was, but perhaps 6½ years after the event, the impression he had of the accident, both sudden and unexpected, might well have been blurred. He remembered seeing the accused's car going in a zig-zag manner for 25 feet before knocking down the old woman, and stopping 10 feet after doing so. This zig-zag "was not very pronounced"; it went on for only about 25 feet, as the woman attempted crossing the road some 20 feet in front of the accused's car and the woman fell in the middle of the road. This witness, while following the accused's car for some distance, was himself going at 25 m.p.h., so that the accused's speed of travel naturally would be about the same.

I do not think, on this evidence, it could be said with truth and certainty, that the accused was driving, as charged, "in a manner which having regard to all the circumstances (including the nature, condition and use of the road and the amount of traffic which was on the road) was dangerous to the public", within the meaning and intent of section 34A of the Ordinance. The essential characteristic of this offence is the reckless or dangerous driving which shows a selfish disregard for the safety of other road users. According to the eye-witness, he had in fact seen nothing wrong in the accused's driving until the old woman was seen attempting to cross in front of the car which hit her. This perhaps accounted for the zig-zag in evasive action.

I entirely agree that reckless or dangerous driving should merit punishment which will serve as a deterrent to selfish motorists. But, as in this case, where the accident was practically unavoidable or could have been avoided only by extraordinary care and instantaneous reflexive action, I must, with all respect, say